91-1393

No._____

In the Supreme Court of the United States

JUSTIN ENDICOTT,

Petitioner,

v.

ICICLE SEAFOODS,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court
of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the plaintiff's right to elect a jury trial in state court Jones Act cases a substantive federal right, as this Court held is true for Federal Employees Liability Act ("FELA") cases in *Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359 (1952)?

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The opinion of the Supreme Court of Washington is reported at 224 P.3d 761. It is reprinted at Appendix A.

JURISDICTION

The Supreme Court of Washington rendered its opinion in this case on January 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

None applicable.

Statutory Provisions

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104 (2006).

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333 (2006).

STATEMENT OF THE CASE

Justin Endicott worked aboard Icicle Seafoods' ("Icicle") ship the *Bering Star*. On May 1, 2003, Endicott and a co-worker, Jason Jenkins, were pushing a 1,500 pound fish cart through the ship's freezer along an overhead guide rail. The cart slipped off the rail, causing Endicott to trip and catch his arm on a pole. Jenkins did not hear Endicott's cries to stop and kept pushing the cart, crushing Endicott's arm against the pole. The

injury required two surgeries and a lengthy recuperation. Icicle's safety manager completed an accident report on May 3, 2003. Attached to the report was a May 9, 2003, statement by Jenkins that generally corroborated the report's account of the accident.

Endicott sued Icicle in King County Superior Court, seeking compensation under the Jones Act for Icicle's negligence and under the general maritime doctrine of unseaworthiness. Icicle demanded a jury trial, but Endicott successfully moved to strike the demand, electing to have his case heard by a judge. Finding for Endicott on the negligence and unseaworthiness claims, the court awarded Endicott damages for medical costs and lost wages, general damages, and prejudgment interest in the amount of $218,257.24. Icicle timely appealed. Icicle sought to vacate the judgment and remand for a new trial by jury. The Court of Appeals certified the case to the Washington Supreme Court for direct review, which it accepted. The Washington Supreme Court issued its opinion on January 7, 2010, holding that the jury election was procedural, not substantive, therefore Washington's procedures on jury trial applied. *Endicott v. Icicle Seafoods*, 167 Wash.2d 873, 224 P.3d 761 (2010). Thus, the Court held, Icicle's jury demand was valid and the case was remanded for a jury trial at Icicle's election.

REASONS FOR GRANTING THE WRIT

A. Summary of Reasons

A growing and irreconcilable split has developed among the federal Circuit Courts of Appeal, as well in the state courts, regarding whether the right to elect a jury trial in state court Jones Act cases is substantive and solely the seaman's decision, or whether the jury right question is procedural and subject to state court procedures. The Washington Supreme Court's final ruling on the matter departed from Ninth Circuit

authority on the issue, and also failed to reconcile one of this Court's leading cases on the question of whether the jury right under the Jones Act is substantive or procedural.

Under Supreme Court Rule 10(b) and (c), this Court has jurisdiction and discretion to review a case if "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals," or if "a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

This case meets the tests of Rules 10(b) and (c). The Washington Supreme Court's opinion conflicts with this Court's own precedent in *Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359 (1952). There is also a split between the federal Circuit Courts of Appeal on the issue raised here. Finally, the Washington Supreme Court's decision conflicts with the decision of the Ninth Circuit Court of Appeals – the federal circuit within which Washington State is located – on an important federal question regarding jury rights under the Jones Act. This Court should grant the petition to finally resolve a question of federal law that has confounded lower federal and state courts for decades.

B. The Washington Supreme Court's Decision Interprets an Important Issue of Federal Law That Conflicts With a Decision of This Court

1. History of Jones Act and the Relevance of *Dice* to Jones Act Cases

Prior to 1920, claims by seamen against shipowners for injuries sustained on the job were addressed under federal admiralty jurisdiction. The jury trial right guaranteed by the Seventh Amendment to the United States Constitution was inapplicable to suits invoking federal admiralty jurisdiction. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460

(1847). More specifically, prior to 1920, an injured seaman did not have a cause of action in negligence against the shipowner employer. *The Osceola*, 189 U.S. 158, 172 (1902). This was confirmed again in *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918).

In 1908, Congress passed what came to be known as the Federal Employees Liability Act ("FELA"). This legislation removed significant barriers for workers seeking to recover damages for injuries sustained in the work place. No longer would assumption of risk, fellow servant doctrine and contributory negligence bar recovery by workers employed by the railroads.

In 1920, Congress passed the Jones Act, 46 U.S.C. § 30104, which adopted FELA by reference for seamen, expressly granting to seamen the rights and remedies available to railroad workers under FELA. *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958); *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514, 516 (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985). As a consequence of this legislation, a seaman who is injured on the job may sue the shipowner for personal injury damages.

It is well established that the Jones Act is remedial in nature and must be construed liberally in favor of the seaman employee. This is because injured sea personnel do not enjoy the same on-the-job protections enjoyed by their land-based counterparts. For example, seamen do not have the benefit of no-fault worker compensation systems. *See e.g.*, Wash. Rev. Code § 51.12.100(1); *More v. Dep't of Ret. Sys.*, 137 P.3d 73, 76 (2006). They do not have the benefit of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901-50 (2009). The Jones Act is their only

relief for on-the-job injuries. *More*, 137 P.3d at 74 n.1. This Court in *Isbrandtsen Co. v. Johnson* held with respect to the Jones Act claim:

> Whenever congressional legislation in aid of seamen has been considered here since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen. The history and scope of the legislation is reviewed in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-35, and notes. "Our historic national policy, both legislative and judicial, points the other way [from burdening seamen]. Congress has generally sought to safeguard seamen's rights." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246. "[T]he maritime law by inveterate tradition has made the ordinary seamen a member of a favored class. He is a 'ward of the admiralty,' often ignorant and helpless, and so in need of protection against himself as well as others.

343 U.S. 779, 782 (1952).

The Ninth Circuit, in which Washington State is located, follows this Court's tradition of liberal construction in dealing with injury claims by a seaman. *See, e.g., Davis v. Bender Shipbuilding & Repair Co., Inc.*, 27 F.3d 426, 429, *cert. denied*, 513 U.S. 1000 (9th Cir. 1994); *Williams v. Tide Water Associated Oil Co.*, 227 F.2d 791, 794 (9th Cir. 1955), *cert. denied*, 350 U.S. 960 (1956).

The Jones Act language at issue here indicates that a seaman has a right of election in proceeding with a negligence claim:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....

46 U.S.C. § 30104 (2006).

Given the Jones Act's adoption by reference of FELA's rights and remedies for rail workers, 46 U.S.C. § 30104 FELA cases are particularly important to any Jones Act analysis. In *Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359 (1952), this Court specifically

held that the right to elect a jury is a federal substantive right and is not a procedural matter to be left to the states. 342 U.S. at 363. In *Dice*, an injured rail worker sued in negligence in state court under FELA. The employer defended by arguing that the worker had signed a release of claims, but the worker responded that the release had been obtained by fraud. Ohio state procedural rules required that trial judges, not juries, would decide certain types of fraud claims. The Ohio Supreme Court concluded that the state's procedural rules applied, and denied the worker a jury trial on the issue. This Court reversed the Ohio Supreme Court, ruling that Ohio could not apply its procedural rule that the fraud issue was to be decided by the judge:

> We have previously held that [t]he right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence and that it is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence is to take away a goodly portion of the relief which Congress has afforded them. *It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used.*

Id. at 363 (citations and internal quotation marks omitted, emphasis added). *Dice* makes clear that the jury trial right is a *substantive federal remedy afforded to workers,* and is not a matter of state procedural law. *Id.*

The Washington Court did not distinguish this Court's holding in *Dice* despite acknowledging Congress' clearly expressed intention to incorporate FELA rights and remedies into the Jones Act. 221 P.3d at 766. As the leading FELA decision on the jury trial right, *Dice* held that this jury-election right is substantive. If the plaintiff's right to elect the mode of trial is substantive rather than procedural, it binds state courts when they adjudicate Jones Act claims.

Instead, the Washington Court ignored *Dice* and relied on language from Jones Act cases, none of which holds that the right to elect is purely jurisdictional. *Id.* The Washington Court also rejected controlling Ninth Circuit Court of Appeals precedent and adopted the reasoning of Illinois state courts on the subject. Then, the Court applied the Washington Constitution and concluded that Icicle had the right under Washington law to elect a jury trial.

The Washington Court's clear split with *Dice* and with the Ninth Circuit Court of Appeals demonstrates the urgent need for resolution by this Court. Because the jury right is substantive, not procedural, federal substantive law should control over state procedural law on this issue. There is no court remaining to address the issue except this Court.

C. There Is a Split Among the Circuit Courts of Appeal and State Courts Regarding Whether Under the Jones Act the Right to Elect a Jury Trial Is Substantive

The Washington Supreme Court is not the only court to ignore or misread *Dice* in deciding this issue. The question of whether the Jones Act jury right is substantive federal law or subject to state procedures has been the subject of conflicting opinions in the fifty years since *Dice* was decided. The Washington Supreme Court acknowledged in its opinion that there is a direct conflict between the Circuit Courts, and between various states, regarding the jury trial election right in state court Jones Act claims. 224 P.3d at 765.

The Ninth Circuit has interpreted the Jones Act and FELA to provide a seaman the substantive federal right to elect the mode of trial (jury vs. nonjury). *Craig v. Atl. Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994), *cert. denied*, 513 U.S. 875 (1994). The

Ninth Circuit explained that "The plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant." The *Craig* court looked first at the Seventh Amendment, which preserved a party's right to a jury trial as it existed at common law. *Id.* at 475. Since there was no common law right to a jury trial in admiralty cases at the time of the Seventh Amendment's adoption, the Seventh Amendment did not apply to suits that invoke only a federal court's admiralty jurisdiction. *Waring*, 46 U.S. at 460. Because the Jones Act provided a seaman with a benefit not available at common law, the *Craig* court reasoned that the right was substantive, not procedural. *Id.* The *Craig* court also used *exclusio alterius* reasoning to conclude that the seaman's right of election included the right to elect a jury trial. *Id.* at 475-76. California has agreed with the Ninth Circuit's interpretation. *Peters v. City & County of San Francisco*, No. A061042, 1994 WL 782237, 1995 A.M.C. 788 (Cal. App. Mar. 14, 1994). *Peters* permitted the plaintiff to elect the mode of trial in a Jones Act and general maritime suit filed in state court under the saving to suitors clause. *Id.* at *3-4.

The Fifth and Seventh Circuit Courts of Appeal, Illinois, and Louisiana have taken a so-called "jurisdictional" position: seamen under the Jones Act may only elect the jurisdictional basis of trial (in admiralty vs. at law) and do not have the right to choose a jury or a bench trial. *Tex. Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir. 1964) (per curiam) ("The Jones Act merely affords the injured seaman the choice between a suit in admiralty without a jury and a suit on the civil side of the docket with a jury."); *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 665-68 & n. 5 (7th Cir. 1998) (treating the Jones Act election as pertaining to jurisdiction, with procedural

consequences as incidents); *Bowman v. American River Transportation Co.*, 838 N.E.2d 949 (2005), *cert. denied*, 547 U.S. 1040 (2006); *Lavergne v. W. Co. of N. Am., Inc.*, 371 So.2d 807 (La. 1979); *Hahn v. Nabors Offshore Corp.*, 820 So.2d 1283, 1284 (La. App. 2002). According to these courts, state procedural law, not substantive federal law, applies to provide both seamen and employers the right to elect a jury trial in Jones Act cases tried in state court. Although subsequent Fifth Circuit authority seems to contradict *Palermo*, the Washington Supreme Court dismissed this conflict as illusory. *Endicott*, 224 P.3d at 766 n. 1.

The conflict on this subject has even extended to intrastate decisions. The decision here seems to conflict with other Washington authority on the subject. For example, the Washington Court of Appeals in *Hoddevik v. Arctic Alaska Fisheries Corp.*, 970 P.2d 828, 830, *review denied*, 989 P.2d 1140 (1999), *cert. denied*, 528 U.S. 1155 (2000) held that the State may not make changes in "substantive maritime law" when a case is brought in state court.

> For cases that can be brought in state court under the "saving the suitors" clause, a state may 'adopt such remedies, and . . . attach to them such incidents, as it seems fit' so long as it does not attempt to make changes in the 'substantive maritime law.'

Id. at 830 (*citing American Dredging Co.*). The *Hoddevik* court went on to state that "state courts must follow substantive maritime law in such cases." *Id.*, *citing Offshore Logistics, Inc. v. Talientire*, 477 U.S. 207, 222-23 (1986). Likewise, the Washington Supreme Court has held that substantive maritime law applies when the events giving rise to the lawsuit occur on navigable waters and the activity has the potential to affect maritime commerce. *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 25 (1993), *cert. denied*, 513 U.S. 819 (1994). The federal interest in uniform substantive maritime law

preempts any conflicting state law. Thus, the *Hoddevik* court held that a state court may not provide a remedy which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 830, citing *American Dredging Co v. Miller,* 510 U.S. 443, 447 (quoting *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 216 (1917) (remaining citation omitted)).

Illinois presents another example of an intrastate conflict created by this issue. The Illinois Supreme Court's *Bowman* decision was necessitated by a lower court split. One decision had followed *Craig's* statutory interpretation and concluded the jury right was substantive. *Allen v. Norman Bros., Inc.*, 678 N.E.2d 317, 319-20 (1997). Another explored the historical meaning of the Jones Act and adopted a jurisdictional interpretation. *Hutton v. Consol. Grain & Barge Co.*, 795 N.E.2d 303, 306-09 (2003). The Illinois Supreme Court in *Bowman* agreed with the *Hutton* court and concluded that the right to elect was jurisdictional. However, the *Bowman* court 1) failed to apply federal substantive maritime law, as state courts are required to do in a Jones Act case; 2) incorrectly determined that it need not follow the rule set forth in *Dice* that the right to a jury trial in a FELA case is substantive, and not procedural, and 3) incorrectly employed the last antecedent doctrine never used in federal cases that addressed the question of a plaintiff having the sole right to demand a jury. Had the *Bowman* court applied substantive federal maritime law as required by *Craig,* and followed the Supreme Court's holding in *Dice,* the Illinois court could not have reached its holding that "the availability of a jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum." *Bowman,* 838 N.E.2d at 959.

State and federal courts on both sides of this question have looked to this Court's precedent to support their conclusions. Courts that concluded the jury election right is substantive have followed this Court's holding in *Dice*. Courts that have held the jury issue merely procedural, and the Jones Act election "jurisdictional," have relied on language in *Panama R. Co. v. Johnson*, 264 U.S. 375, 390-91 (1924): "[T]he injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident."

This conflict has existed for decades and Congress has not acted to resolve it by clarifying or amending the language of the Jones Act. The dispute can only be finally resolved if this Court grants this petition for a writ of certiorari.

D. The Jones Act Election Right Is an Important Question of Federal Law

This case directly raises an important question of federal law: the right to elect either a judge or a jury trial in a Jones Act case. The right to elect a jury or a judge can be granted by statute, although it is not enshrined in the Constitution. *Singer v. U.S.*, 380 U.S. 24, 36 (1965) ("Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in Patton, in some instances waive his right to a trial by jury"). This Court has acknowledged that the difference between a jury trial and a bench trial is not merely academic:

> To be sure, a jury trial is more burdensome than a bench trial. The defendant may challenge the selection of the venire; the jury itself must be impaneled; witnesses and arguments must be prepared more carefully to avoid the danger of a mistrial.

U. S. v. Goodwin, 457 U.S. 368, 383 (1982).

> However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied

> with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.

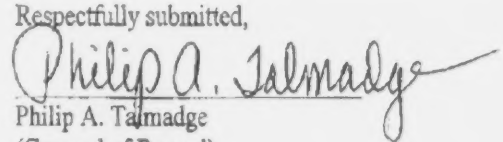
Duncan v. State of Louisiana, 391 U.S. 145,158 (1968).

This Court is confronted here with the unusual circumstance of a state court having rejected the controlling holding of the federal circuit court in which it is located on a question of federal law. The Washington Supreme Court's decision relied heavily on Illinois' *Bowman* opinion in rejecting *Craig* and *Dice*. This strange circumstance reflects the larger confusion surrounding this issue, and amply demonstrates the need for this Court's resolution.

E. Conclusion

The time has come for this Court to resolve the disputes that have arisen in federal and state courts interpreting the Jones Act. This case involves an important issue of federal law that should be decided by this Court to resolve the existing conflict. This Court should grant Endicott's petition for a writ of certiorari, reverse the Washington Supreme Court, and reinstate the trial court's judgment.

Respectfully submitted,



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APPENDIX A

C

Supreme Court of Washington,
En Banc.
Justin **ENDICOTT**, an individual, Respondent,
v.
ICICLE SEAFOODS, INC., an Alaska Corporation, Appellant.
No. 82635-8.

Jan. 7, 2010.

Background: Seaman, whose arm was crushed by a fish cart while he was working in the freezer on one of his employer's ships, sued employer, seeking compensation under the Jones Act and under the general maritime doctrine of unseaworthiness. Seaman successfully struck employer's jury trial demand. After a bench trial, the Superior Court, King County, Douglas D. McBroom, J., ruled for seaman on both the negligence and unseaworthiness claims and awarded seaman damages and prejudgment interest. Employer appealed, and the Court of Appeals certified the case to the Supreme Court for direct review.

Holdings: The Supreme Court, En Banc, Stephens, J., held that:
(1) the Jones Act entitles the plaintiff to elect the jurisdictional basis for the suit (in admiralty vs. at law), not the mode of trial (jury vs. nonjury);
(2) defendant was entitled to demand a jury trial on seaman's claims; and
(3) an award of prejudgment interest is appropriate in a mixed Jones Act and general maritime suit

Vacated and remanded.

West Headnotes

[1] Admiralty 16 ⇐2

16 Admiralty
16I Jurisdiction
16k2 k. Saving of common-law remedy. Most Cited Cases

Courts 106 ⇐489(1)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(1) k. In general. Most Cited Cases
The "saving to suitors" clause of federal law giving federal courts exclusive jurisdiction over all cases of admiralty or maritime jurisdiction gives plaintiffs the right to sue on maritime actions in state court provided that the state court proceeds in personam and not in rem. 28 U.S.C.A. § 1333(1).

[2] Admiralty 16 ⇐1.20(1)

16 Admiralty
16I Jurisdiction
16k1.10 What Law Governs
16k1.20 Effect of State Laws
16k1.20(1) k. In general. Most Cited Cases
Maritime suits in state court are governed by substantive federal maritime law.

[3] Federal Courts 170B ⇐284

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(B) Controversies Between Citizens of Different States
170Bk284 k. Particular actions. Most Cited Cases

Federal Courts 170B ⇐340.1

170B Federal Courts
170BV Amount or Value in Controversy Affecting Jurisdiction

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170Bk340 Particular Cases, Claim or Value
170Bk340.1 k. In general. Most Cited Cases
Maritime plaintiffs may sue at law in federal court if they meet the diversity of citizenship and amount in controversy requirements.

[4] Federal Courts 170B ⇐194

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(C) Cases Arising Under Laws of the United States
170Bk194 k. Navigable waters, laws relating to, maritime laws and law of nations. Most Cited Cases
General maritime law does not confer federal question jurisdiction.

[5] Seamen 348 ⇐29(1)

348 Seamen
348k29 Personal Injuries
348k29(1) k. In general. Most Cited Cases
Federal Employers' Liability Act (FELA) cases are persuasive authority when interpreting the meaning of the Jones Act unless some aspect of the Jones Act or maritime law makes FELA's application unreasonable in a particular context. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51; 46 U.S.C.(2006 Ed.) § 30104(a).

[6] Seamen 348 ⇐29(5.1)

348 Seamen
348k29 Personal Injuries
348k29(5.1) k. Nature and form of remedy. Most Cited Cases
Jones Act allows seamen to sue at law, but not in admiralty, to recover for their employers' negligence. 46 U.S.C.(2006 Ed.) § 30104(a).

[7] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases
Whether plaintiff-seaman's power, under the Jones Act, to elect between different forms of action was a statutory right to elect the mode of trial, i.e., jury vs. nonjury, or whether it was the right to select the jurisdictional basis of trial, i.e., at law vs. in admiralty, was issue of law subject to de novo review. 46 U.S.C.(2006 Ed.) § 30104(a).

[8] Admiralty 16 ⇐80

16 Admiralty
16VIII Hearing or Trial
16k80 k. Trial by jury. Most Cited Cases

Seamen 348 ⇐29(5.1)

348 Seamen
348k29 Personal Injuries
348k29(5.1) k. Nature and form of remedy. Most Cited Cases
The Jones Act does not provide the plaintiff a substantive federal right to determine the mode (jury/nonjury) of trial; rather, the Act entitles the plaintiff to elect only the jurisdictional basis for the suit (at law/in admiralty). 46 U.S.C.(2006 Ed.) § 30104(a).

[9] Seamen 348 ⇐29(5.2)

348 Seamen
348k29 Personal Injuries
348k29(5.2) k. What law governs. Most Cited Cases
Once a Jones Act plaintiff has chosen a suit at law in state court, state procedural law determines whether the parties may demand a jury trial. 46 U.S.C.(2006 Ed.) § 30104(a).

[10] Jury 230 ⇐12(1)

230 Jury
230II Right to Trial by Jury

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230k12 Nature of Cause of Action or Issue in General

230k12(1) k. In general. Most Cited Cases

To determine whether the State Constitution confers a right to a jury trial in a particular cause of action, a two-step approach is followed: the first step is to determine the scope of the jury trial right as it existed at the State Constitution's adoption, and the second step is to determine the causes of action to which the right attaches. West's RCWA Const. Art. 1, § 21.

[11] Jury 230 ⟹12(1)

230 Jury
230II Right to Trial by Jury
230k12 Nature of Cause of Action or Issue in General

230k12(1) k. In general. Most Cited Cases

For purposes of determining whether State Constitution confers a right to a jury trial in a particular cause of action, the inquiry is not whether the specific cause of action existed at the Constitution's adoption, but rather whether the type of action is analogous to one available at that time. West's RCWA Const. Art. 1, § 21.

[12] Jury 230 ⟹14(1)

230 Jury
230II Right to Trial by Jury
230k14 Particular Actions and Proceedings

230k14(1) k. In general. Most Cited Cases

An action centered on negligence is analogous to the basic tort theories that existed when the State Constitution was adopted, and the constitutional jury trial right applies. West's RCWA Const. Art. 1, § 21.

[13] Jury 230 ⟹14(1)

230 Jury
230II Right to Trial by Jury
230k14 Particular Actions and Proceedings

230k14(1) k. In general. Most Cited Cases

State constitutional right to a jury trial attaches in a Jones Act claim, with the result that either a plaintiff or a defendant may demand a jury trial on such a claim. West's RCWA Const. Art. 1, § 21; 46 U.S.C.(2006 Ed.) § 30104(a).

[14] Appeal and Error 30 ⟹984(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances

30k984(1) k. In general. Most Cited Cases

Appellate court reviews a prejudgment interest award for abuse of discretion.

[15] Appeal and Error 30 ⟹946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review

30k946 k. Abuse of discretion. Most Cited Cases

A ruling based on an erroneous legal interpretation is necessarily an abuse of discretion.

[16] Admiralty 16 ⟹1.20(4)

16 Admiralty
16I Jurisdiction
16k1.10 What Law Governs
16k1.20 Effect of State Laws

16k1.20(4) k. Remedies and procedure. Most Cited Cases

Prejudgment interest in maritime cases is substantive and so is controlled by federal law.

[17] Interest 219 ⟹39(2.25)

219 Interest
219II Time and Computation
219k39 Time from Which Interest Runs in General

219k39(2.5) Prejudgment Interest in General

219k39(2.25) k. Admiralty and mari-

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time matters. Most Cited Cases
Trial court had discretion to award prejudgment interest to injured seaman on his unseaworthiness claim and on his Jones Act claim which was tried to the bench. 46 U.S.C.(2006 Ed.) § 30104(a).

[18] Seamen 348 ⇐1

348 Seamen
348k1 k. Power to regulate and protect. Most Cited Cases
Because seamen are deemed wards of the court, maritime law is generally construed in seamen's favor.

[19] Interest 219 ⇐39(2.25)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.25) k. Admiralty and maritime matters. Most Cited Cases
In a mixed Jones Act and general maritime suit, prejudgment interest is available on any damages awarded under the general maritime claim, even if unapportioned between the Jones Act claims and the maritime claims. 46 U.S.C.(2006 Ed.) § 30104(a).

**763 Michael Alan Barcott, Thaddeus O'Sullivan, Holmes Weddle & Barcott, Seattle, WA, Kara Heikkila, Hall Farley Oberrecht & Blanton, PA, Boise, ID, for Appellant.

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STEPHENS, J.

*876 ¶ 1 This case requires us to decide whether the defendant in a Jones Act (46 U.S.C. § 30104) and general maritime suit filed in state court has a right to a jury trial and whether prejudgment interest is available in such a case. A fish cart crushed Justin **Endicott's** arm while he was working in the freezer on one of Icicle Seafoods' ships. **Endicott** sued in King County Superior Court, seeking compensation under the Jones Act and under the general maritime doctrine of unseaworthiness. **Endicott** successfully struck Icicle's jury trial demand. After a bench trial, the judge ruled for **Endicott** on both the negligence and unseaworthiness claims and awarded **Endicott** damages and prejudgment interest. Icicle appealed the verdict and the interest award. The Court of Appeals certified the case to this court for direct review. We hold that Icicle had a right to a trial by jury and, therefore, vacate the judgment below and remand for new trial. We *877 also hold that prejudgment interest is available in mixed maritime cases.

FACTS AND PROCEDURAL HISTORY

¶ 2 **Endicott** worked aboard Icicle's ship the *Bering Star*. On May 1, 2003, **Endicott** and a co-worker, Jason Jenkins, were pushing a 1,500 pound fish cart through the ship's freezer along an overhead guide rail. The cart slipped off the rail, causing **Endicott** to trip and catch his arm on a pole. Jenkins did not hear **Endicott's** cries to stop and kept pushing the cart, which crushed **Endicott's** arm against the pole. The injury required two surgeries and a lengthy recuperation.

¶ 3 Icicle's safety manager completed an accident report on May 3, 2003. Attached to the report was a May 9, 2003, statement by Jenkins describing the accident in terms very similar to the report. The statement was addressed "To Whom It May Concern" and bore a formal printed name, signature, and date. Pl. Ex. 48, at ICI 0014.

¶ 4 **Endicott** sued Icicle in King County Superior Court, seeking compensation under the Jones Act

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for Icicle's negligence and under the general maritime doctrine of unseaworthiness. Icicle demanded a jury trial, but **Endicott** successfully moved to strike the demand. At the bench trial, the court admitted Jenkins' statement as an admission by a party opponent under Evidence Rule 801(d)(2)(iv). Icicle sought to introduce evidence of **Endicott's** drug use and mental health problems, arguing that they established an alternative cause for some of **Endicott's** lost wages. The court allowed most of this evidence but refused a portion of it, including one social worker's deposition and some proposed exhibits. Finding for **Endicott** on the negligence and unseaworthiness claims, the court awarded **Endicott** damages ****764** for medical costs and lost wages, general damages, and prejudgment interest. Icicle timely appealed.

¶ 5 Icicle seeks to vacate the judgment and remand for a new trial by jury. The Court of Appeals certified the case to ***878** this court for direct review, which we accepted. Ruling Accepting Certification (Jan. 28, 2009).

ANALYSIS

¶ 6 Icicle challenges the judgment below on four grounds. First, Icicle contends that it had a right to a jury trial of **Endicott's** claim. Second, it claims that, as a matter of federal law, the trial court did not have the discretion to award **Endicott** prejudgment interest. Third, Icicle maintains that the trial judge abused his discretion when he admitted Jenkins' statement as an admission by a party opponent. Finally, Icicle argues that the trial judge abused his discretion when he excluded some of the evidence of **Endicott's** drug use and mental health history. We address the first two contentions but do not reach the third and fourth.

1. Jury Trial

¶ 7 Icicle maintains that it had a right to demand a jury trial of **Endicott's** claims. **Endicott** counters that the Jones Act provides him a substantive right to determine whether the case is heard by a judge or a jury. We agree with Icicle. **Endicott** has no substantive right to a nonjury trial because, for Jones Act cases tried in state court, state law grants both parties a right to demand a jury.

A. Background

[1][2][3][4] ¶ 8 The United States Constitution extends the judicial power of the federal courts "to all cases of admiralty and maritime jurisdiction," preserving the general maritime law as a species of federal common law. U.S. Const. art. III, § 2. Congress has given federal courts exclusive jurisdiction over all cases of "admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" 28 U.S.C. § 1333(1) (emphasis added). The "saving to suitors" clause gives plaintiffs the right to sue on maritime actions in state court ***879** provided that the state court proceeds *in personam* (here, "at law") and not *in rem* (here, "in admiralty"). *Madruga v. Superior Court*, 346 U.S. 556, 560-61, 74 S.Ct. 298, 98 L.Ed. 290 (1954). Such suits are governed by substantive federal maritime law. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S.Ct. 202, 98 L.Ed. 143 (1953). Maritime plaintiffs may also sue at law in federal court if they meet the diversity of citizenship and amount in controversy requirements. *E.g., Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1117 (5th Cir.1995) (predicating jurisdiction both in admiralty and on diversity). However, general maritime law does not confer federal question jurisdiction. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 378, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

[5] ¶ 9 In 1903, the United States Supreme Court interpreted the general maritime law to preclude seamen's suits against their employers for negligence. *The Osceola*, 189 U.S. 158, 175, 23 S.Ct. 483, 47 L.Ed. 760 (1903). Congress overturned the result in the *Osceola* by passing the Jones Act, which now provides in relevant part:

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> A seaman injured in the course of employment ... may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to ... a railway employee apply to an action under this section.

46 U.S.C. § 30104(a). The railway-employee law referred to is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which allows recovery for negligence. FELA cases are persuasive authority when interpreting the meaning of the Jones Act unless some aspect of the Jones Act or maritime law makes FELA's application unreasonable in a particular context. *See, e.g., The Arizona v. Anelich*, 298 U.S. 110, 119-23, 56 S.Ct. 707, 80 L.Ed. 1075 (1936) (declining to apply FELA's assumption of the risk rules to Jones Act claims).

[6] ¶ 10 By its terms, the Jones Act allows seamen to sue at law, but not in admiralty, to recover for their employers' *880 negligence. In an early case, the United States **765 Supreme Court adopted a fictitious reading of the act in order to save it from constitutional challenge. *See Pan. R.R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924). The litigant argued that the Jones Act was unconstitutional for two reasons. First, it impermissibly carved out a personal-injury piece of admiralty jurisdiction and transferred it to the courts' common law jurisdiction. *Id.* at 385-87, 44 S.Ct. 391. Second, the Jones Act violated due process by allowing the plaintiff-seaman to "elect between varying measures of redress and between different forms of action" without according equal rights to the defendant-employer. *Id.* at 392, 44 S.Ct. 391. The Court avoided the first issue by interpreting the act to allow negligence suits *both* in admiralty and at law. An admiralty suit would yield a bench trial, while a suit at common law would yield a jury trial. *Id.* at 390-91, 44 S.Ct. 391. The Court dispatched the second contention by concluding that "[t]here are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement." *Id.* at 392, 44 S.Ct. 391.

[7] ¶ 11 *Johnson* left ambiguous whether the plaintiff's power to "elect between ... different forms of action" is a statutory right to elect the mode of trial (jury vs. nonjury) or whether it is the right to select the jurisdictional basis of trial (at law vs. in admiralty). If the latter, the jury trial right flows procedurally from the choice of jurisdiction. This question is what the parties here contest. We review this issue of law de novo. *State v. Womac*, 160 Wash.2d 643, 649, 160 P.3d 40 (2007).

B. Extent of the Jones Act Election

¶ 12 There is a split among federal and state courts as to which interpretation of *Johnson* is correct, with the Ninth Circuit and California on one side and the Fifth Circuit, Seventh Circuit, Louisiana, and Illinois on the other.

¶ 13 **Endicott** argues for the Ninth Circuit's "statutory" interpretation, claiming that he has a substantive federal *881 right to elect the mode of trial (jury vs. nonjury) under the Jones Act. Br. of Resp't at 6-8. For support he cites *Craig v. Atl. Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994) ("The plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant."). The *Craig* opinion uses exclusio alterius reasoning to conclude that the defendant in a nondiversity Jones Act suit filed in federal court has no right to demand a jury trial. *Id.* at 475-76. **Endicott** also relies on *Peters v. City & County of San Francisco*, No. A061042, 1994 WL 782237, 1995 A.M.C. 788 (Cal.App. Mar. 14, 1994) (unpublished). *Peters* adopts reasoning like *Craig's* in the state-court context, denying the defendant a jury trial right in a Jones Act and general maritime suit filed in state court under the saving to suitors clause. *Id.* at *3-4. Finally, **Endicott** argues based on FELA decisions that this jury-election right is substantive. *See Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, 96

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L.Ed. 398 (1952) ("[T]he right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere 'local rule of procedure'...."). If the plaintiff's right to elect the mode of trial is substantive, it binds state courts when they adjudicate Jones Act claims.

¶ 14 Icicle argues for the Fifth and Seventh Circuits' "jurisdictional" position that **Endicott's** Jones Act election is limited to choosing the jurisdictional basis of trial (in admiralty vs. at law) and that jury trial rights flow from this election as procedural incidents. *See, e.g., Johnson*, 264 U.S. at 391, 44 S.Ct. 391 ("[T]he injured seaman is permitted, but not required, to proceed on the common law side of the court *with a trial by jury as an incident.*" (emphasis added)). This means that state procedural law, not substantive federal law, governs the defendant's right to a jury trial in state court. To the extent that *Craig* suggests that **Endicott** has a substantive right to determine the mode of trial, Icicle argues, it is wrong.

¶ 15 Federal case law interpreting the Jones Act convinces us that the jurisdictional interpretation is correct, **882 i.e., the plaintiff's election exists solely as to the jurisdiction on **766 which trial is predicated. In contrast, the Ninth Circuit's statutory interpretation arises from a misreading of two Fifth Circuit cases.[FN1]

FN1. The first case held that the plaintiff in a nondiversity Jones Act suit at law may redesignate his suit as one in admiralty (eliminating jury trial) without the defendant's consent. *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1215-17 (5th Cir.1986). The other held that state procedure governs jury trial rights when a plaintiff brings maritime claims in a suit at law in state court. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1487-88 (5th Cir.1992). These holdings are in fact consistent with the jurisdictional interpretation of the Jones Act, as confirmed recently. *See Becker v. Tidewater, Inc.*, 405 F.3d 257, 259 (5th Cir.2005) (basing jury trial rights on jurisdiction, not on the Jones Act). It is true that *Rachal* and *Linton* contain broad language suggesting that the Jones Act confers a statutory right to a jury trial. The Ninth Circuit uncritically adopted this language without acknowledging that this reading erroneously divorced the jury trial right from its historical ties to jurisdiction. *See Craig*, 19 F.3d at 475-76; *see also* David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649 (1999) (tracing the mistake).

¶ 16 Only two years after *Johnson*, the United States Supreme Court decided *Panama Railroad Co. v. Vasquez*, 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed. 1085 (1926). The issue was whether a Jones Act plaintiff is required to sue in federal court. The Court concluded that *Johnson* interpreted the Jones Act to allow plaintiffs to sue "either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury." *Id.* at 560, 46 S.Ct. 596. The in personam (at law) suits for negligence could be brought in either federal or state courts under the saving to suitors clause. *Id.* at 560-61, 46 S.Ct. 596. *Vasquez* is consistent with the jurisdictional interpretation of the Jones Act: the Court treats the statute as referring to suits at law versus suits in admiralty and discusses the jury trial right as an incident following from this distinction.

¶ 17 The progression of federal cases reinforces this interpretation. *See McCarthy v. Am. E. Corp.*, 175 F.2d 724, 726 (3d Cir.1949) ("[T]he election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action."); **883*Williams v. Tide Water Associated Oil Co.*, 227 F.2d 791, 793-94 (9th Cir.1955) (holding that the jury could hear both the maritime and Jones

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Act claims because they were brought at law under the saving to suitors clause, not in admiralty); *McAfoos v. Can. Pac. S.S., Ltd.*, 243 F.2d 270, 272, 274 (2d Cir.1957) (requiring the trial court to treat the plaintiff's suits as an election to bring her in personam claims on the law side in front of a jury); *Tex. Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir.1964) (per curiam) ("The Jones Act merely affords the *injured seaman* the choice between a suit in admiralty without a jury and a suit on the civil side of the docket with a jury."); *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 665-68 & n. 5 (7th Cir.1998) (treating the Jones Act election as pertaining to jurisdiction, with procedural consequences as incidents)

¶ 18 Louisiana was one of the first states to recognize the federal trend and employ a jurisdictional analysis when determining jury trial rights in state-court Jones Act suits. *See Lavergne v. W. Co. of N. Am., Inc.*, 371 So.2d 807 (La.1979); *Hahn v. Nabors Offshore Corp.*, 820 So.2d 1283, 1284 (La.App.2002). The *Lavergne* plaintiff sued in state court under the Jones Act and general maritime law. His demand for a jury trial was rebuffed. *Lavergne*, 371 So.2d at 808. On appeal, the Louisiana Supreme Court concluded that, in maritime suits brought at law in state court, state procedural law governs the availability of a jury trial. *Id.* at 809-10. The case was remanded because Louisiana procedural law afforded the plaintiff the right to a jury trial. *Id.*

¶ 19 Illinois recently resolved a split among its own intermediate appellate courts to side with Louisiana. *See Bowman v. Am. River Transp. Co.*, 217 Ill.2d 75, 298 Ill.Dec. 56, 838 N.E.2d 949 (2005). One appellate decision had followed *Craig's* statutory interpretation. *Allen v. Norman Bros., Inc.*, 286 Ill.App.3d 1091, 222 Ill.Dec. 705, 678 N.E.2d 317, 319-20 (1997). Another explored the historical meaning of the Jones Act and adopted a jurisdictional interpretation. *884**767*Hutton v. Consol. Grain & Barge Co.*, 341 Ill.App.3d 401, 276 Ill.Dec. 950, 795 N.E.2d 303, 306-09 (2003). In a thorough opinion, the Illinois Supreme Court disapproved of *Allen* and adopted *Hutton* as the proper statement of the law. *Bowman*, 298 Ill.Dec. 56, 838 N.E.2d at 957-59. It then interpreted state procedural law to grant the defendant a right to trial by jury in the case. *Id.* 298 Ill.Dec. 56, 838 N.E.2d at 959-61.

[8][9] ¶ 20 We find the analysis in *Bowman* persuasive. The Jones Act affords the plaintiff the right to elect only the jurisdictional basis for his suit. Once the plaintiff makes his choice of jurisdiction, procedural rights flow as normal incidents of the suit. This means that there is no substantive federal right to elect the mode of trial directly. Rather, state procedural law determines whether the parties have a right to a jury trial. The question then becomes whether Washington law, namely the Washington Constitution, gives the defendant in a Jones Act suit a right to trial by jury.

C. Jury Trial Right in Jones Act Cases under the Washington Constitution

[10][11][12] ¶ 21 To determine whether the Washington Constitution confers a right to a jury trial in a particular cause of action, this Court follows a two-step approach. Wash. Const. art. I, § 21; *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 645, 771 P.2d 711; 780 P.2d 260 (1989). The first step is to determine the scope of the jury trial right as it existed at the State constitution's adoption in 1889. The second step is to determine the causes of action to which the right attaches. *Id.* As to the former, *Sofie* held that the determination of damages in an action at law was within the jury's province in 1889. *Id.* at 645-48, 771 P.2d 711. As to the latter, the inquiry is not whether the specific cause of action existed in 1889, but rather whether the type of action is analogous to one available at that time. *Id.* at 648-49, 771 P.2d 711 (applying modern "tort theories by analogy to the [1889] common law tort actions"). An action "centered on negligence" is analogous to the "basic tort theories" that existed when the constitution was *885 adopted, and the constitutional

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jury trial right applies. *Id.* at 649-50, 771 P.2d 711.

[13] ¶ 22 *Sofie* supports finding a jury trial right in a Jones Act suit. First, the fact finding function of the jury in a Jones Act case is to determine damages for negligence. This is exactly what *Sofie* held to be within the scope of the 1889 jury trial right. Second, although admiralty did not permit seamen to sue their employers for negligence in 1889, *see The Osceola*, 189 U.S. at 175, 23 S.Ct. 483, the negligence remedy conferred by the Jones Act is the same "basic cause of action" available at common law against nonmaritime employers. *See Sofie*, 112 Wash.2d at 650, 771 P.2d 711 (citing employer negligence cases from 1888). Indeed, reported Washington case law reveals in personam negligence claims by seamen against shipmasters in 1899, and there is no indication that similar claims would not have been tried to a jury 10 years earlier.[FN2] *See Keating v. Pac. Steam Whaling Co.*, 21 Wash. 415, 419, 58 P. 224 (1899) (noting the effect of evidence on the jury in a seaman's personal injury case). We therefore conclude that the Washington constitutional right to a jury trial attaches in a Jones Act claim, with the result that either a plaintiff or a defendant may demand a jury trial on such a claim.

> FN2. "The Supreme Court's decision in *The Osceola*, which temporarily halted suits by seamen based on negligence, does not alter the fact that such suits were indeed tried to juries" before that time. *Bowman*, 298 Ill.Dec. 56, 838 N.E.2d at 961.

¶ 23 In sum, the Jones Act does not provide the plaintiff a substantive federal right to determine the mode (jury/nonjury) of trial. The act entitles the plaintiff to elect only the jurisdictional basis for the suit. Once the plaintiff has chosen a suit at law in state court, state procedural law determines whether the parties may demand a jury trial. The Washington Constitution affords Jones Act litigants a jury trial right because the Jones Act is rooted in negligence and so fits within the jury trial right's 1889 purview. **886 Therefore, we vacate the judgment below and remand for a jury trial.[FN3]

> FN3. Both parties assume that, if Icicle has a jury trial right on **Endicott's** Jones Act claim, the right necessarily extends to **Endicott's** unseaworthiness claim. *Cf. Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 21, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) (adopting this approach in federal court). This point is not self-evident under our law. Jury trial rights for the Jones Act and general maritime claims do not necessarily arise together. Nevertheless, the parties' briefs do not address the jury trial right in general maritime cases or what effect it may have on this case, a "mixed" action in which general maritime and Jones Act claims are joined in one suit. Because the issue is not disputed, we simply assume without deciding that the jury will resolve both claims on remand.

**768 2. Prejudgment Interest

[14][15] ¶ 24 Icicle argues that, as a matter of federal law, the trial court could not award prejudgment interest on **Endicott's** claims.[FN4] We review a prejudgment interest award for abuse of discretion. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wash.2d 506, 519, 145 P.3d 371 (2006). However, a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

> FN4. Icicle also states that prejudgment interest may not be awarded on future damages. This is a nonissue because the trial judge awarded interest only on past damages. Clerk's Papers at 117-18.

[16] ¶ 25 Prejudgment interest in maritime cases is substantive and so is controlled by federal law. *See, e.g., Militello v. Ann & Grace, Inc.*, 411 Mass. 22, 576 N.E.2d 675, 678 (1991) (collecting cases). The

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parties agree that prejudgment interest may be awarded in general maritime claims. *Magee v. U.S. Lines, Inc.*, 976 F.2d 821, 822-23 (2d Cir.1992).

¶ 26 Icicle argues that prejudgment interest is unavailable under FELA and so is unavailable under the Jones Act. *See* Jones Act, 46 U.S.C. § 30104(a) (incorporating FELA by reference); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336-39, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988) (holding that FELA does not allow for recovery of prejudgment*887 interest). This deduction is far from obvious.[FN5] As a compromise, many federal courts have held prejudgment interest to be unavailable in Jones Act suits brought at law but available in suits in admiralty. *See, e.g., Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 340 (5th Cir.1972); *Williamson v. W. Pac. Dredging Corp.*, 441 F.2d 65, 67 (9th Cir.1971). *But see Martin v. Harris*, 560 F.3d 210, 219-21 (4th Cir.2009) (never allowing prejudgment interest awards under the Jones Act); *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622, 626 (6th Cir.1948) (same). State courts, which hear such suits only at law, have interpreted this dichotomy to mean the following: if the trial is to the jury, the case is analogous to a federal suit at law and prejudgment interest is unavailable. If tried to the bench, the case is analogous to a federal suit in admiralty and prejudgment interest may be awarded. *See, e.g., Marine Solution Servs., Inc. v. Horton*, 70 P.3d 393, 412 & n. 88 (Alaska 2003); *Milstead v. Diamond M. Offshore, Inc.*, 676 So.2d 89, 96-97 (La.1996).

FN5. *Monessen* based its decision on the fact that prejudgment interest was unavailable in common law negligence suits when FELA was passed. 486 U.S. at 337-38, 108 S.Ct. 1837. This reasoning does not readily apply to the Jones Act because of the long tradition of awarding prejudgment interest in admiralty cases. *See, e.g., Great Lakes S.S. Co. v. Geiger*, 261 F. 275, 279 (6th Cir.1919) (awarding prejudgment interest on a maritime claim for personal injury).

[17] ¶ 27 By this logic, the trial court did not abuse its discretion in awarding prejudgment interest to **Endicott**. Prejudgment interest was available on **Endicott's** unseaworthiness claim, and it was available on **Endicott's** Jones Act claim because he tried it to the bench. Thus, the trial judge had discretion to award prejudgment interest as a matter of law.

¶ 28 On remand, however, the defendant will demand a jury trial and prejudgment interest will not be available under the Jones Act. *See Marine Solution Servs.*, 70 P.3d at 412 & n. 88. Thus, the question is whether prejudgment interest is available in a mixed jury trial that includes general maritime claims (allowing prejudgment interest) and Jones Act claims (disallowing it).

*888 ¶ 29 The federal circuit courts are split on the issue. Because a judge has no authority to award prejudgment interest under the Jones Act in jury trial cases, the majority **769 rule disallows an award unless the verdict specifies the damages are apportioned solely to general maritime claims. *See, e.g., Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 (5th Cir.1984). The Second Circuit disagrees. By analogy to other situations in which only one of the plaintiff's claims allows recovery of prejudgment interest, the Second Circuit holds that the unavailability of prejudgment interest under the Jones Act should not limit the plaintiff's recovery on his maritime claim. *Magee*, 976 F.2d at 822-23.

¶ 30 The two relevant Washington cases do not resolve the question. One case adopted the majority rule in dicta but explicitly rested its holding on unrelated grounds. *Foster v. Dep't of Transp.*, 128 Wash.App. 275, 277, 279-80, 115 P.3d 1029 (2005) (basing its holding on sovereign immunity). The other case held that federal maritime law allowing recovery of prejudgment interest preempts Washington law not allowing for the same recovery. *Paul v. All Alaskan Seafoods, Inc.*, 106 Wash.App. 406, 427, 24 P.3d 447 (2001). *Paul* is inapposite because, in that case, preemption analysis provided a rule of decision for choosing between federal and state legal rules. Here there is no such rule of de-

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cision.

[18] ¶ 31 We conclude that the minority rule of *Magee* employs the better reasoning. Because seamen are deemed wards of the court, maritime law is generally construed in seamen's favor. Moreover, *Magee* makes common sense. When a seaman prevails on his maritime claim of unseaworthiness, he is entitled to recover his damages plus prejudgment interest. It would be unjust if the employer's violation of *another* of the seaman's rights-protection from negligence under the Jones Act-deprived the seaman of part of the recovery due on his first claim.

[19] ¶ 32 We therefore hold that, in a mixed Jones Act and general maritime suit, prejudgment interest is available on any damages awarded under the general maritime claim, *889 even if unapportioned between the Jones Act claims and the maritime claims. If Icicle is concerned that it may pay interest on damages arising solely out of the Jones Act claim, it can ask for a special verdict form apportioning damages.

3. Evidentiary Issues

¶ 33 As noted, Icicle raises additional evidentiary issues as a basis to reverse the verdict in **Endicott's** favor. Because of our disposition of this case, it is not necessary to address these contentions.

CONCLUSION

¶ 34 Icicle is entitled to demand a jury trial of **Endicott's** claims. We therefore vacate the judgment below and remand for a new trial. We also hold that an award of prejudgment interest is appropriate in a mixed Jones Act and general maritime suit.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON, MADSEN, SANDERS, CHAMBERS, OWENS, FAIRHURST and J.M. JOHNSON, JJ.
Wash.,2010.
Endicott v. Icicle Seafoods, Inc.

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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Motion for Seaman's Leave to Proceed Under Rule 39, Petition for a Writ of Certiorari in U.S. Supreme Court Cause No. _____ to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 2, 2010 at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

003/023

Supreme Court, U.S.
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No. 09-1393

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTIN ENDICOTT,

Petitioner,

v.

ICICLE SEAFOODS, INC.,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of the State of Washington

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a Jones Act defendant have a right to demand a jury when a seaman elects to proceed in a state court forum pursuant to the saving to suitors clause, where the law of the chosen forum allows for either party to elect a jury trial?

PARTIES TO PROCEEDING

Justin Endicott, the Petitioner, moved for leave to proceed *in forma pauperis* pursuant to Rule 39. Icicle Seafoods, Inc., the Respondent, opposes the Petition for Writ of Certiorari pursuant to Rule 39.5.

CORPORATE DISCLOSURE STATEMENT

For the purposes of Rule 29.6, Icicle Seafoods, Inc. does not have any parent companies, subsidiaries, or affiliates that are publicly traded.

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JURISDICTION

The Supreme Court of Washington issued its opinion on January 7, 2010, vacating the judgment below and remanding for a new trial. A mandate was issued to the trial court on February 3, 2010. Review of a state court decision by the United States Supreme Court is limited to final judgments or decrees. 28 U.S.C. § 1257(a). The United States Supreme Court does not have jurisdiction as further proceedings are now before the state trial court and there is no final judgment or decree.

STATEMENT OF THE CASE

On January 20, 2006, Mr. Endicott brought suit against Icicle Seafoods, Inc. ("Icicle") in the trial court of the state of Washington pursuant to 28 U.S.C. § 1333(1), the saving to suitors clause,[1] for injury claims associated with his employment. These claims were brought under the Jones Act, 46 U.S.C. § 30104, and the traditional maritime doctrine of unseaworthiness.

Icicle demanded a jury trial, but Mr. Endicott moved to strike that demand, asserting that a Jones Act plaintiff has the exclusive right to demand a jury. The trial court granted Mr. Endicott's motion and the case was tried to the bench. The trial court found for Mr. Endicott on his Jones Act and unseaworthiness claims and

---

[1] The saving to suitors clause allows a state court to "adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation." Ghotra v. Bandila Shipping Co., 113 F.3d 1050, 1054 (9th Cir. 1997) (quoting Madruga v. Superior Court of Cal., 346 U.S. 556, 560-61 (1954) (internal quotations omitted)). In other words, the saving to suitors clause allows seamen to pursue their maritime claims in state courts.

awarded damages. Icicle appealed, arguing that the trial court erred in striking its jury demand.

On January 7, 2010, the Washington State Supreme Court issued its unanimous decision in this case, holding in relevant part that where the Jones Act seaman pursues claims in Washington state court, both the plaintiff and the defendant are entitled to demand a jury. Endicott v. Icicle Seafoods, Inc., 224 P.3d 761 (Wash. 2010). The Washington State Supreme Court held that the Jones Act litigants' right to demand a jury trial depended on the rules of the plaintiff's chosen forum. Since Mr. Endicott chose to pursue his claims in Washington state court, both the plaintiff and the defendant were entitled to demand a jury based on Washington procedural rules and state constitutional protections. The judgment of the trial court was vacated and the case is presently remanded to the trial court for a jury trial.

SUMMARY OF THE ARGUMENT

Review by this Court is not warranted because the Washington State Supreme Court's opinion does not satisfy the requirements of either Supreme Court Rule 10(b) or 10(c). The Washington State Supreme Court's opinion is in fact in harmony with the decisions of this Court as well as the United States courts of appeal and the state courts of last resort that have considered this Jones Act jury issue.

On March 27, 2006, this Court declined to review the Illinois Supreme Court's Bowman v. American River Transport Co., 838 N.E.2d 949 (Ill. 2005), cert.

denied, 547 U.S. 1040 (2006) opinion that involved the very same question at issue here. Bowman v. Am. River Transp. Co., 547 U.S. 1040 (2006). The only court of last resort to address this question since March 27, 2006, is the Washington State Supreme Court in this case. No United States court of appeals has since addressed the issue. As noted below, the Washington State Supreme Court unanimously adopted the reasoning of the Illinois Supreme Court in holding that a Jones Act defendant's entitlement to a jury trial was determined by the procedural rules and constitutional protections of the plaintiff's chosen forum. Accordingly, there have been no developments in the case law since this Court denied certiorari in Bowman that would warrant review in this case.

Moreover, the Endicott decision does not contradict this Court's opinion in Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359 (1952), because Dice did not hold that a FELA[2] plaintiff has the exclusive right to demand a jury trial in state court. Furthermore, Dice, a FELA case, is of little persuasive value on this issue because FELA lacks the jury language included in the Jones Act. Dice also provides little precedential value because FELA litigants were not subject to the traditional bar to a jury trial that existed in admiralty jurisdiction.

Additionally, the United States courts of appeal that have considered the extent of a Jones Act defendant's right to demand a jury have consistently held that where there is a basis for federal court jurisdiction independent of the Jones Act,

[2] Federal Employers' Liability Act, involving injuries to railway employees.

such as diversity, both the plaintiff and the defendant are entitled to demand a jury. If the seaman seeks to bar the Jones Act defendant from demanding a jury, their choice is to bring the case on the admiralty side of the federal court or under the federal question jurisdiction pursuant to the Jones Act. No United States court of appeals has rendered a decision that restricts the Jones Act defendant's right to demand a jury in state court. Instead, the one United States court of appeals that has considered this question held that when the Jones Act plaintiff proceeds in state court, the state procedural rules determine the parties' rights to a jury. Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir. 1992), cert. denied, 506 U.S. 976 (1992).

As such, there is no conflict between the United States courts of appeal that have considered the Jones Act jury issue. Contrary to Mr. Endicott's assertion, the Ninth Circuit's decision in Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994), does not conflict with decisions from other circuits. Rather, the Ninth Circuit's decision in Craig was limited to whether a defendant has the right to demand a jury in federal court where the Jones Act is the federal court's sole basis for jurisdiction. Id. The Ninth Circuit has never held that a Jones Act defendant cannot demand a jury in state court.

Finally, there is no split on this issue between the state courts of last resort that have considered the issue. The Peters v. City of San Francisco, 1995 AMC 788, 791 (Cal. Ct. App. 1994) (unpublished) case relied upon by Mr. Endicott was not

issued by the state court of last resort and cannot even be cited in the court that issued the opinion. See Cal. R. of Court 8.1115(a). A conflicting unpublished opinion from an intermediate appellate court is insufficient to warrant review by this Court. The only other state court of last resort to consider this issue held that the right to a jury trial is governed by state law when a Jones Act case is brought in state court. See Bowman v. Am. River Transp. Co., 838 N.E.2d 949 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006).

There is no conflict for this Court to settle. Accordingly, the Petition for Writ of Certiorari should be denied.

ARGUMENT

1. The Consequence of Choosing the Forum Under the Jones Act.

Article III, section 2 of the United States Constitution states in part that "[t]he judicial Power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ." See also 28 U.S.C. § 1333(1). Cases brought in federal court pursuant to this grant of exclusive admiralty jurisdiction are tried to the bench because, historically, there was no recognized right to a jury in admiralty. See Fed. R. Civ. P. 38(e); Wilmington Trust v. U.S. District Court, 934 F.2d 1026, 1029 (9th Cir. 1991). The federal district courts' admiralty jurisdiction is "exclusive of the courts of the States." 28 U.S.C. § 1333(1). This necessarily means that state courts do not have admiralty jurisdiction and can never decide Jones Act cases in admiralty. "Because admiralty jurisdiction is exclusively federal, a true 'admiralty' claim is never cognizable in state court...." Linton v. Great Lakes Dredge & Dock

Co., 964 F.2d 1480, 1487 (5th Cir. 1992) (citing The Hine, 71 U.S. (4 Wall.) 555, 18 L. Ed. 451 (1866)).

Prior to 1966, the federal courts were divided into common law courts and admiralty courts. Wilmington Trust, 934 F.2d at 1029. In 1966, common law and admiralty courts were merged in the federal system. Id. Federal Rule of Civil Procedure 9(h) allows the pleader to elect "to proceed in admiralty on claims cognizable both in admiralty and the court's general civil jurisdiction." Id. (quoting Fed. R. Civ. P. 9(h) advisory committee's notes to 1966 amendment). "One of the most important procedural consequences [of this election] is that in a civil action either party may demand a jury trial, while in the suit in admiralty there is no right to a jury trial except as provided by statute." Id. (emphasis added). Thus, by pleading the case as one arising in admiralty under Rule 9(h), the plaintiff in federal court effectively has the right to preclude a defendant from having a jury trial.

The Jones Act was enacted in 1920 and allows an injured seaman to pursue negligence remedies in admiralty or at law, "with the right of a trial by jury." 46 U.S.C. § 30104. The Jones Act states in relevant part, "[a] seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right to a jury trial, against the employer." 46 U.S.C. § 30104. As noted by the Illinois Supreme Court,

> [the] "new" substantive rights created by the Jones Act consist solely of a "new" maritime remedy whereby a

> seaman may choose to sue in negligence, and the right [to "elect"] to file that suit either: (1) at law, with the attendant right to a trial by jury; or (2) in admiralty, where there is no right to a trial by jury."

Bowman v. American River Transp. Co., 838 N.E.2d 949, 955 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006).

If Mr. Endicott wanted to preserve his exclusive right to determine a jury or bench trial in this Jones Act case, he should have filed this action in the United States district court, where that exclusive right exists. That is, the plaintiff desiring a bench trial may bring their case in admiralty under 28 U.S.C. § 1333, as there, neither party is entitled to a jury trial. Bowman, 838 N.E.2d at 956-57. Instead, Mr. Endicott pursued this case in the common law courts of the state of Washington, where both parties enjoy the right to elect a trial by jury.

2. **The Washington State Supreme Court's Opinion Does Not Conflict With Dice.**

Icicle agrees that substantive federal maritime law governs suits brought in state courts pursuant to the saving to suitors clause, 28 U.S.C. § 1333(1). Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953). But Dice did not grant Jones Act plaintiffs an exclusive substantive right to elect a jury trial. While FELA cases are instructive in the Jones Act context, Mr. Endicott ignores the fact that FELA does not contain the jury provision language included in the Jones Act. 46 U.S.C. § 30104. Mr. Endicott also ignores the fact that admiralty litigants were traditionally not entitled to a jury, thus making FELA jury cases of little value in

this analysis. See Craig v. Atlantic Richfield Co., 19 F.3d 472, 475 (9th Cir. 1994). Therefore, Dice is neither persuasive nor relevant.

To the extent that Dice does recognize a "substantive" right to a jury, that right is enjoyed by all litigants, and thus supports a Jones Act defendant's right to demand a jury. 342 U.S. at 363; see also Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 340 (1988). In holding that the Dice plaintiff had a right to a jury trial under FELA, this Court found that "[t]he right to trial by a jury is 'a basic and fundamental feature of our system of federal jurisprudence.'" Dice, 342 U.S. at 363. This Court made no distinction, as suggested by Mr. Endicott, that this "basic and fundamental feature" was afforded only to the Jones Act plaintiff. Id.

Instead, Mr. Endicott argues that he is entitled to a "liberal" interpretation of the Jones Act that would bar the defendant from demanding a jury regardless of the plaintiff's chosen forum. He further asserts that he is entitled to the exclusive right to demand a jury because "injured sea personnel do not have the benefit of no-fault worker compensation systems" and "[t]he Jones Act is their only relief for on-the-job injuries." Petition at pp. 4-5 (citing More v. Dept. of Retirement Sys., 137 P.3d 73, 74 n.1 (Wash. Ct. App. 2006)). This assertion is substantively incorrect as it ignores the "no-fault" maintenance and cure benefits that Mr. Endicott himself obtained in this case. See Flunker v. U.S., 528 F.2d 239, 242 (9th Cir. 1975) (maintenance and cure obligates employers to provide room, board, and medical care to a seaman injured on the job, even through no fault of the employer). In any event, such an

assertion, inaccurate or otherwise, does not provide this Court with a basis to accept review.

3. **There is No Conflict Between the Washington State Supreme Court Opinion and the United States Courts of Appeal That Have Considered the Jones Act Jury Question.**

The Washington State Supreme Court's opinion here does not conflict with the Ninth Circuit's decision in Craig v. Atlantic Richfield Co. because Craig did not address whether a Jones Act defendant had the right to demand a jury where the plaintiff pursued claims in state court. 19 F.3d 472. The Craig opinion was limited to the question of whether such a right existed where the Jones Act was the sole basis for the federal court's jurisdiction. In fact, Craig and the subsequent Ghotra decision support the Washington State Supreme Court's determination that the rights of the parties with respect to a jury depend on the Jones Act plaintiff's chosen forum. Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997). As noted by the Ninth Circuit,

> [a] plaintiff with in personam maritime claims has three choices: He may file suit in federal court under the federal court's admiralty jurisdiction, in federal court under diversity jurisdiction, . . . or in state court. The difference between these choices is mostly procedural; of greatest significance is that **there is no right to a jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court.**

Ghotra, 113 F.3d at 1054 (emphasis added).

Mr. Endicott's reliance on Craig overstates its holding and its application to this case. Craig's rejection of a defendant's right to demand a jury trial was not

absolute. For example, the Craig court acknowledged "both the defendant and the plaintiff have a right to demand a jury trial" when a case is brought pursuant to the federal court's diversity jurisdiction. Craig, 19 F.3d at 476. Had the Ninth Circuit believed that a Jones Act defendant never has a right to demand a jury, this diversity jurisdiction analysis would have been inconsistent with such a holding.

Importantly, the Craig decision did not address a defendant's right to a jury in a Jones Act case proceeding in state court. See 19 F.3d at 475-76. Rather, the Craig court's holding was limited to whether a defendant has a right to demand a jury in federal court where the Jones Act is the "federal court's sole basis for jurisdiction." Craig, 19 F.3d at 475-76 (emphasis added); (citing Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986); Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1489 n.16 (5th Cir. 1992), cert. denied, 506 U.S. 975 (1992)).

The limited question considered in Craig together with the Ninth Circuit's subsequent Ghotra decision illustrate that the right to demand a jury is preserved for both parties where the Jones Act claim is brought in state court. Accordingly, the Washington State Supreme Court's opinion does not conflict with the Ninth Circuit.

4. **There Is No Conflict Between Decisions of the United States Courts of Appeal.**

Mr. Endicott's assertion that the Ninth's Circuit's decision in Craig conflicts with the Fifth Circuit is misplaced. Craig in fact relied on the Fifth Circuit's decision in Rachal v. Ingram Corp., 795 F.2d 1210. Craig, 19 F.3d at 476. In

state court, "[p]rocedurally, whether he, or the defendant, would have a right to a trial by jury would depend on state civil procedure." Linton, 964 F.2d at 1487 (citation omitted) (emphasis added).

Since Craig is limited to the Jones Act defendant's right to demand a jury where the Jones Act is the sole basis for the federal court's jurisdiction, it does not contradict Rachal or Linton. Moreover, Ghotra makes clear that the Ninth Circuit is in harmony with the Fifth Circuit's Linton opinion. Finally, the Craig court cited Rachal and Linton without exception. In sum, the Craig decision did not create substantive maritime law prohibiting a Jones Act defendant from demanding a jury trial where the Jones Act plaintiff decides to file claims in state court pursuant to the saving to suitors clause.

Finally, Mr. Endicott's assertion that the Seventh Circuit's per curiam Wingerter opinion creates a conflict with the Ninth Circuit is without merit for at least two reasons. First, the Wingerter footnote cited by Mr. Endicott actually cites the Ninth Circuit's Ghotra case as authority. See Petition at p. 8 (citing Wingerter v. Chester Quarry Co., 185 F.3d 657, 665-68 & n.5 (7th Cir. 1999) (per curiam)). Second, the Wingerter court ultimately concluded it did not have jurisdiction to consider the appeal and passed on the issue of whether a Jones Act defendant has the right to demand a jury. Wingerter, 185 F.3d at 671 n.9. Accordingly, Mr. Endicott has failed to show a conflict justifying this Court's review.

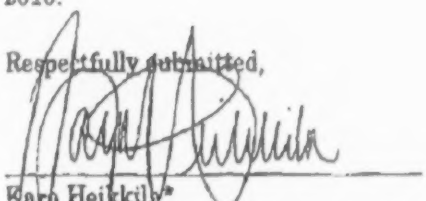
5. **There is No Split Between the State Courts of Last Resort That Have Considered the Jones Act Jury Question.**

The only state courts of last resort to consider the Jones Act jury question, Washington and Illinois, have both concluded that the availability of a jury depends on the law of the chosen forum. See Endicott v. Icicle Seafoods, Inc., 224 P.3d 761 (Wash. 2010); Bowman v. Am. River Transp. Co., 838 N.E.2d 949 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006). The Washington Supreme Court is the only state court of last resort to consider this question since this Court denied certiorari on the Bowman case in 2006. Since the Washington Supreme Court unanimously adopted the reasoning of the Illinois Supreme Court, review by this Court is not appropriate.

Due to the lack of conflict between state courts of last resort, Mr. Endicott cites a conflict between the Washington State Supreme Court decision and an unpublished California Court of Appeals case, Peters v. San Francisco, 1995 AMC 788, 791 (Cal Ct. App. 1994) (unpublished). The Peters case was not issued by a state court of last resort and cannot even be cited in the court that issued the opinion. Cal. R. of Court 8.1115(a). An unpublished opinion from an intermediate state appellate court is insufficient to create a conflict sufficient for this Court to grant certiorari pursuant to Rule 10(b). Additionally, Mr. Endicott suggests there is an "intrastate" conflict between intermediate Illinois appellate courts, which was in fact resolved by the Illinois Supreme Court in Bowman, 838 N.E.2d 949, cert. denied, 547 U.S. 1040 (2006). An "intrastate" conflict resolved by the state court of

DATED this 14 day of May, 2010.

Respectfully submitted,



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